

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARION E. YOUNG,

Plaintiff,

vs.

R. JAMES NICHOLSON, Secretary
of DEPARTMENT OF VETERANS
AFFAIRS, and the DEPARTMENT
OF VETERANS AFFAIRS,

Defendants.

NO. CV-05-407-RHW

**FINDINGS OF FACTS AND
CONCLUSIONS OF LAW**

Plaintiff brings the above-captioned cause of action, asking the Court to review the decision of the Merit Systems Protection Board upholding the termination of her employment from the Veterans Affairs Medical Center, and asserting additional claims of discrimination on the basis of disability, failure to provide reasonable accommodations, violations of the union contract, constructive termination, hostile work environment, and involuntary retirement.

The parties agreed to have the Court hear this case on the administrative record. On December 8, 2006, a bench trial was held on the administrative record. Plaintiff was represented by Julie Wilchins; Defendants were represented by Andrew Biviano.

Having fully reviewed all the materials submitted by the parties and the record in this matter, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Marion Young has been totally deaf since birth, due to maternal measles during pregnancy (R. 646). American Sign Language (ASL) is her primary language. *Id.* English is her second language (R. 650). Plaintiff reads English between a second and third grade level (R. 1767).
2. Plaintiff began working for the Veterans Affairs Medical Center (VAMC), located in Spokane, Washington, in 1987, as a data transcriber/keypunch operator (R. 647). When her job became obsolete in 1994, she transferred to the file department. *Id.* During the first thirteen years she worked at the VAMC, Plaintiff consistently received positive performance evaluations (R. 1227-1269).
3. Since the early 1990s, Plaintiff was one of the few deaf employees employed at a federal agency in Eastern Washington (R. 1736).
3. In 1994, Plaintiff began having problems with her then supervisor Christina O'Dell-Holloway (R. 647). Plaintiff believed other people were being promoted before her, and she was being denied accommodations and training. *Id.* In 2000, Plaintiff filed a complaint with the EEO, alleging that she was being harassed by her co-workers and supervisor (R. 648).
4. In order to settle her complaint, Plaintiff and the VAMC agreed to transfer Plaintiff to a position as a prosthetics purchasing agent. *Id.*
5. During the negotiations that were conducted to facilitate the transfer, Plaintiff was told she would receive appropriate and adequate training and reasonable accommodations to allow her to be successful at her new position in the prosthetics department *Id.*
6. The agency then created a new position as prosthetics clerk, and it was hoped that she would be promoted to prosthetics purchasing agent with a corresponding higher GS grade as she completed her training (R. 1913-15).
7. Plaintiff was told she would be provided with interpreters during training,

1 and that she would be provided with classes and schooling as needed for her
2 to be successful (R. 648). Plaintiff was also told that her supervisors and co-
3 workers would be trained on how to work with people who are deaf. *Id.* As
4 a result of these representations, Plaintiff agreed to move to the prosthetics
5 department and agreed to settle her EEO complaint (R. 649).

6 8. Plaintiff moved to the prosthetics department in November, 2000, and
7 signed the settlement agreement in February, 2001 (R. 649).

8 9. During Plaintiff's first month of employment, interpreters were provided for
9 her approximately once a week for half a work day at a time, then the
10 provision for an interpreter tapered off (R. 649).

11 10. Mr. Guy Lounsbury was Plaintiff's direct supervisor. Pursuant to VAMC
12 policy, a VAMC employee's direct supervisor is responsible for making an
13 initial determination as to whether an employee with a disability will receive
14 a reasonable accommodation, and what type of accommodation the
15 employee might receive (R. 1992). Mr. Lounsbury had no experience or
16 training in communicating with someone who is deaf and uses ASL to
17 communicate. At the time he became her supervisor, Mr. Lounsbury did not
18 consult with any experts or specialists regarding the necessary
19 accommodations that would be required by Plaintiff¹ (R. 1921).

21 ¹Mr. Lounsbury testified that he met with Sandra Carr in November, 2000
22 (R. 1920). During this time frame, Ms. Carr was employed as a Deaf and Hard of
23 Hearing Specialist at the Eastern Washington Center for the Deaf and Hard of
24 Hearing, in Spokane, Washington. According to Mr. Lounsbury, they discussed
25 setting up a visual link to the fire alarm system, and talked about general needs in
26 terms of dealing with somebody with hearing impairment. *Id.* Ms. Carr disputes
27 that she met with Mr. Lounsbury in November, 2000. Instead, she testified that the
28 first meeting between her and Mr. Lounsbury occurred after she contacted Mr.

11. Plaintiff experienced some difficulty in performing her job, in part because ALS was her primary language.² In order to accomplish her job duties, Plaintiff used a number of training manuals that were complicated and lengthy (R. 650). The manuals contained words that she did not know, or did not know how to use. *Id.* Consequently, she did not thoroughly

Lounsbury and set up an appointment in June, 2001 (R. 1798). Mr. Lounsbury testified that he communicated with Ms. Carr without the use of interpreters (R. 1920). Ms. Carr is deaf and she typically uses an interpreter for conversations with hearing people (R. 1797). The Court finds that if Mr. Lounsbury met with someone regarding the physical accommodations Plaintiff would need while working in the prosthetics department, it was not Ms. Carr. Moreover, it is clear that Mr. Lounsbury did not contact either the Eastern Washington Center for the Deaf and Hard of Hearing or the Washington Division of Vocational Rehabilitation with regard to any particularized assessment of Plaintiff's needs in relationship to the prosthetics position (R. 1797, 1736).

²John Evans testified that ALS is as different from English as English is from Italian (R. 1740). Mr. Evans is employed at the Washington State Department of Vocational Rehabilitation (DVR) as the statewide program manager (R. 1734). He explained that a highly intelligent person who speaks English might go to Italy and be completely lost in terms of comprehending or understanding the written or spoken language. *Id.* Jennifer White testified that ALS is an inflective language; that is, an accent on a word indicates whether it is the subject or object, rather than its placement in the sentence (R. 1749). Ms. White is a vocational consultant and direct of Able Opportunities, Inc, a vocational consulting agency certified as a Community Rehabilitation Program by the Washington Department of Vocational Rehabilitation (R. 1744). She stated that ASL is an atopic-comment language, in which a general idea is expressed first, followed by commentary on that idea, in a similar fashion to a newspaper headline (R. 1749).

1 understand these manuals. *Id.*

2 12. Plaintiff asked to have an interpreter work with her to help her understand
3 the manuals (R. 650-51). These requests were denied. *Id.* Plaintiff
4 attempted to teach herself out of the manual using an English dictionary (R.
5 652). She asked for and received assistance from other VA employees who
6 helped her learn computer skills and helped her learn how to draft
7 correspondence and other documents. *Id.*

8 13. Plaintiff asked to take work-related courses on work time that would have
9 helped her perform her job duties (R. 652). This request was denied. *Id.*
10 She asked for a deaf dictionary,³ and training or assistance in writing letters.
11 *Id.* This request was denied. She asked for training on how to write letters.
12 *Id.* This request was denied.

13 14. During the year she worked in the prosthetics department, her co-workers
14 received 86 hours and 55.5 hours, respectively, and she received 25 hours of
15 training (R. 655).

16 15. Mr. Lounsbury would not let her keep her personal items in a cupboard
17 above her desk because the cupboards were “VA property” (R. 662).

18 16. During her tenure in the prosthetics, at times, Plaintiff would be left in the
19 prosthetics department over the lunch period (R. 654). This happened when
20 the rest of the staff attended training provided by manufacturers of
21 prosthetics (R. 1972). Plaintiff opted not to go because interpreters
22 generally were not provided for these session. *Id.*

23 17. When Plaintiff was left in the department by herself, Mr. Lounsbury would
24 lock the door from the outside. For many months, Plaintiff did not know
25 that the door was locked at the time, but she became aware of it and
26

27 ³Ms. White testified that a deaf dictionary provides American Sign Language
28 signs for English words.

1 questioned Mr. Lounsbury regarding the locked door (R. 655, 671).⁴

2 Mr. Bedwell testified that he remembers on two occasions when he made
3 plans to have lunch with Plaintiff, the door was locked, and there was no
4 way to get Plaintiff's attention (R. 462). Mr. Lounsbury's explanation for
5 locking the door was because he did not want Plaintiff to interact with the
6 patients because of her disability (R. 463, 671).

7 18. Many times when the interpreter was providing interpretative services to
8 Plaintiff, Mr. Lounsbury would disrupt their work and often interrupt their
9 training (R. 1793).

10 _____
11 ⁴The following e-mail exchange took place between Plaintiff and Mr.
Lounsbury:

12 From: Lounsbury, Guy R.
13 Sent: Thursday, August 16, 2001 9:13 AM
Subject: CLOSING THE OFFICE DOOR

14 Marion,

15 I would like you to explain why, when no one else is going to be in the office
16 you insist on having the office door remain open. Because of your disability you
17 are not able to interact with patients should they come in the office. I feel it would
18 be more appropriate to close the door and have a sign indicating when the office
staff will be available.

19 Please explain clearly so I can address your concerns and possibly find an
20 alternative solution to the problem.

21 Guy

22 From: Young, Marion E.
23 Sent: Thursday, August 16, 2001 9:19 AM
Subject: CLOSING THE DOOR

24 guy,
25 you are insult me as I am disability you should not right to say tome and I have to
26 right to open the door to kept the air out of the office and I went to irm to fix my
27 password. You did not see what I am doing

28 From: Lounsbury, Guy R.
Sent: Thursday, August 16, 2001 9:33 AM
Subject: CLOSING THE DOOR

When there is no other office staff present I would to close the door because you
are not able to help the patients because you can not hear them and would have a
great deal of difficulty talking to them. I need to know if there is a reason why you
do not want the door close. It is not a matter of you having a right to have an open
door.

1 19. Plaintiff began experiencing extreme anxiety, and sought doctor's care and
2 missed work because of her anxiety; her doctors encouraged her to find
3 another job at the VA (R. 517-530).

4 20. On June, 2001, Sandra Carr,⁵ Plaintiff, and an interpreter met with Mr.
5 Lounsbury (R. 1798). At this meeting, Ms. Carr reiterated the need for
6 Plaintiff to obtain interpreters and further training, but Mr. Lounsbury
7 dismissed her requests as "unreasonable." *Id.*

8 21. At a second meeting with Ms. Carr, Mr. Lounsbury presented a proposed
9 agenda, in which he wanted to explore whether Plaintiff had a learning
10 disability, and he questioned whether Plaintiff was capable of becoming a
11 purchasing agent (R. 672).

12 22. In July, 2001, Plaintiff again met with Ms. Carr and Mr. Lounsbury and
13 again requested training and interpreters (R. 1799). Mr. Lounsbury
14 criticized Plaintiff's work product and continued to suggest that she was not
15 qualified for the position (R. 676, 1801). He continued to refuse to provide
16 any type of accommodation. *Id.*

17 23. On September 14, 2001, Mr. Lounsbury initiated an informal performance
18 improvement plan process. The purpose of the plan was to improve
19 Plaintiffs's communication with Mr. Lounsbury, and to improve her ability
20 to follow his instructions (R. 677). In October, 2001, he met with Plaintiff
21 and identified areas that he thought were unsatisfactory in Plaintiff's
22 performance (R. 678). On October 23, 2001, he wrote up a formal
23 performance improvement plan (R. 679).

24 ⁵At the time of the meeting, Ms. Carr was employed as a Deaf and Hard of
25 Hearing Specialist at the Eastern Washington Center for the Deaf and Hard of
26 Hearing. Currently, she is employed as a job developer with Tesh Industries in
27 Coeur d'Alene, Idaho, for Washington Division of Vocational Rehabilitation in
28 Spokane, Washington.

1 24. Around this time, Mr. Lounsbury suggested to Plaintiff that she apply for
2 disability retirement (R. 1780; R. 1765).

3 25. In November, 2001, Plaintiff began the filing process for disability
4 retirement (R. 664). As part of the application process, she provided a copy
5 of her entire medical file to the VA.

6 26. On November 9, 2001, an e-mail was distributed among the management
7 team that discussed the appropriate course of action while Plaintiff's
8 application was pending (R. 1221).

9 27. At some point, there was talk that a position in the mailroom would be
10 suitable. Mr. Lounsbury spoke to the mailroom supervisor and discussed the
11 fact that some of the equipment required audible cues (R. 711) Mr.
12 Lounsbury also expressed concern that the mailroom would lose its
13 volunteers if Plaintiff worked for the mailroom. Mr. Lounsbury ultimately
14 concluded that Plaintiff would not be successful working in the mailroom or
15 any other position at the VA, and expressed his reservation to the mailroom
16 supervisor (R. 1952). The mailroom supervisor declined to accept Plaintiff
17 for employment in his department.

18 28. Things came to a head on November 19, 2001. Plaintiff had a confrontation
19 with Mr. Lounsbury about her completing a particular task. Afterward, she
20 felt sick, left work, went to the VAMC health center accompanied by Mr.
21 Bedwell, and was placed on "medical leave from [her] current work
22 environment due to stressors." She never returned to work at the VA.

23 During this time, she was paid through her sick leave and through her leave
24 transfer program. Her paid leave expired on December 31, 2001 (R. 1695).

25 29. Plaintiff's request for disability retirement was ultimately denied on April
26 23, 2002.

27 30. In response, the VA sent her a letter notifying her that she was now in
28 AWOL (Absent Without Leave) status (R. 20).

31. Plaintiff sent Defendants a letter notifying them that she had filed a request for reconsideration (R. 96). This request was denied in October 1, 2002. Through negotiations, Plaintiff was carried with leave without pay status (LWOP) until October 20, 2002 (R. 1695).
32. On October 9, 2002, the VA sent Plaintiff a second letter advising her of her AWOL status. (R. 769). Plaintiff was told it was not an acceptable option for her to stay absent from work without approved leave; and if her absence continued, the VA would begin formal action to remove her from VA employment. *Id.*
33. On April 18, 2003, the VA sent Plaintiff a third letter again advising her of her AWOL status and asking whether she intended to return to work, submit medical documentation for her absence, or resign (R. 769). She was again advised that if she failed to inform the VA of her decision, a recommendation for removal would be made. She failed to respond to the letter.
34. During this time, Plaintiff was attempting to locate medical personnel who were proficient in dealing with deaf persons, but she was not successful (R. 395).
35. On May 12, 2003, Plaintiff was issued a letter of proposed removal, citing her absence without leave from October 22, 2002 through May 9, 2003 (R. 771).
36. A meeting was held on May 29, 2003. Plaintiff attended the meeting with her father, Tom Williams, Jane Schilke, Kathy Brown, and an interpreter (R. 1796).
37. Plaintiff stated that she might be able to come back to work, and that there might be some work that she could do without getting stressed out (R. 1796).
38. Mr. Williams stated that Plaintiff would have to return to her old job under the same condition or be fired (R. 1796).

- 1 39. On June 26, 2003, the agency issued a letter sustaining the proposed removal
2 and advised Plaintiff that her removal would be effective July 11, 2003 (R.
3 772).
- 4 40. In September, 2003, Plaintiff filed a formal EEO complaint (R. 393-395).
5 On December 14, 2004, the removal was upheld by the Department of
6 Veterans Affairs, Office of Employment Discrimination Complaint
7 Adjudication (Ct. Rec. 34, Ex. B).
- 8 41. Plaintiff appealed this final agency decision (FAD) to the Merit Systems
9 Protection Board (MSPB). The Board upheld the agency's removal in
10 December, 2005 (R. 2098).
- 11 42. In support of her discrimination claims, Plaintiff provided expert testimony
12 regarding the nature of her disability and the available accommodations that
13 could have been provided to her throughout her tenure at the VAMC.
14 Specifically, Plaintiff provided Declarations from John Evans, Program
15 Manager for the Washington State Division of Vocational Rehabilitation;
16 Jennifer L. White of Able Opportunities, a vocational consulting agency
17 certified as a Community Rehabilitation Program by the Washington
18 Division of Vocational Rehabilitation, Inc.; Dr. Wendy Marlowe, Clinical
19 Neuropsychologist, who specializes in clinical neuropsychology and
20 language pathology; and Sandra Carr, a job developer for the Washington
21 Division of Vocational Rehabilitation. The experts were unanimous in
22 concluding that VAMC failed to take any reasonable steps to accommodate
23 Plaintiff and they all agreed that with reasonable accommodation, she could
24 perform her job. The experts identified numerous agencies that VAMC
25 could have contacted to obtain information regarding available services that
26 could have been provided to Plaintiff, many at no charge to the VAMC.
27 They also set forth the various types of accommodations that could have
28 been put in place to allow Plaintiff to be successful as a prosthetics clerk or

1 purchasing agent.

2 43. Defendants did not provide any expert testimony, other than the testimony of
3 the employees at the VAMC. These employees, notably Mr. Lounsbury, had
4 concluded that there were no reasonable accommodations that could be put
5 in place, other than the provision of interpreters at Mr. Lounsbury's
6 discretion. None of these employees had experience or expertise in dealing
7 with deaf employees.

8 44. The Court finds Plaintiff's expert opinions highly persuasive.

9 CONCLUSIONS OF LAW

10 Plaintiff asks the Court to overturn and vacate the final decision of the
11 MSPB; declare that Defendants discriminated against her on the basis of her
12 disability; reinstate Plaintiff to her position with the VAMC; and provide for
13 compensatory damages. Plaintiff also asks that the Court reverse and remand to
14 the MSPB so it can address Plaintiff's claims for involuntary retirement, hostile
15 work environment, and constructive discharge.

16 A. Standard of Review

17 Plaintiff is bringing a "mixed case," that is, one that involves both a
18 personnel action and a claim of discrimination. *Washington v. Garrett*, 10 F.3d
19 1421, 1428 (9th Cir. 1993). In this situation, this Court has jurisdiction to review
20 the lawfulness of the personnel action as well as the discrimination claim. *Id.* The
21 Court conducts a *de novo* review of Plaintiff's discrimination claims and reviews
22 the MSPB's decision under a deferential standard. 5 U.S.C. § 7703(c); *Garrett*, 10
23 F.3d at 1428. Under this standard, the Court will uphold the MSPB's decision
24 unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in
25 accordance with law; obtained without procedures required by law, rule, or
26 regulation having been followed; or unsupported by substantial evidence. *Id.*

B. De Novo Review of Discrimination Claims

Plaintiff argues that Defendants discriminated against her on the basis of her disability when they failed to provide reasonable accommodations, that her removal was discriminatory because it was motivated by her disability, and Defendants failed to engage in the interactive process. Plaintiff also asserts that Defendants created a hostile working environment based on her disability.

(1) Federal Rehabilitation Act of 1973

The Federal Rehabilitation Act of 1973 (29 U.S.C.A. §§ 701-794) establishes the Rehabilitation Services Administration and authorizes programs for the furnishing of vocational and rehabilitative services to disabled persons, for the promoting of employment opportunities in the public and private sectors for disabled persons, for the constructing and improving of rehabilitation facilities, and for the barrier-free reconstructing of public facilities. The Act provides a private case of action in favor of persons subjected to disability discrimination by the federal government employing agencies. *See Prewitt v. United States Postal Service*, 662 F.2d 292, 303 (5th Cir. 1981).

(a) Failure to Provide Reasonable Accommodation

Federal agencies have an affirmative duty to provide reasonable accommodations for the known physical and mental limitations of an otherwise “qualified individual with a disability,” unless the agency can demonstrate that the accommodation would impose an “undue hardship.” 29 C.F.R. § 1614.203(b)(2). In *Buckingham v. United States*, the Ninth Circuit held that the Rehabilitation Act mandates that federal employers have an affirmative obligation to accommodate that goes beyond mere nondiscrimination. 998 F.2d 735, 740 (9th Cir. 1993).

Plaintiff has the burden of proving that she is a qualified handicapped individual. *Id.* A “qualified handicapped” individual is one who, with or without reasonable accommodation, can perform the essential functions of their job. *Id.* If accommodation to his or her handicap is required to enable them to perform

1 essential job functions, the plaintiff must only provide evidence sufficient to make
2 at least a facial showing that reasonable accommodation is possible. *Id.*

3 Plaintiff must also show that “the suggested accommodation would, more
4 probably than not, have resulted in [her] ability to perform the essential functions
5 of [her] job.” *Id.* at 742. The burden then shifts to Defendants to show that the
6 suggested accommodation is unreasonable. *Id.*

7 **i. Whether Plaintiff is a Qualified Individual**
8 **with a Disability**

9 As a threshold matter, Defendants challenge whether Plaintiff is a qualified
10 individual with a disability. According to Defendants, “it is not Plaintiff’s
11 deafness that makes her unable to perform her job, but the fact that she never
12 learned how to read.” (Ct. Rec. 32, p. 15). This assertion highlights Defendants’
13 failure to understand the true nature of Plaintiff’s disability.⁶ It is true that Plaintiff
14 reads between a second and third grade. Her reading ability, however, is tied
15 directly to her deafness and the fact that ASL is her primary language. John Evans
16 stated that Plaintiff’s situation is similar to other deaf employees’ situations (R.
17 1740). Mr. Evans explained that because her primary language is ASL, she has
18 difficulty reading, writing and comprehending English. *Id.* Notably, Mr. Evans

19
20 ⁶The Court notes that Defendants’ statement that Plaintiff never learned how
21 to read is not supported by the record. Specifically, Dr. Wendy Marlowe states
22 that Plaintiff’s intellectual ability is rated in the high average range (R. 1764). Dr.
23 Marlowe states that Plaintiff’s word recognition skills ranged up to about third
24 grade level in comparison with a normal hearing population educated in the United
25 States, and her reading comprehension was at approximately the end of the second
26 grade level in comparison with a hearing population (R. 1767). Thus, the evidence
27 shows that Plaintiff can, in fact, read English. Moreover, Jennifer White reports
28 that the average deaf high-school graduate in the United States reads at a fourth-
grade level.

1 stated that one of the misconceptions many employers who have never worked
2 with a deaf employee before is that ASL is a form of English. *Id.* Plaintiff,
3 however, is able to use ASL to understand concepts involving the English
4 language, and her use of ASL is consistent with her good intelligence (R. 1765).

5 Although Plaintiff reads English at a third-grade level, she does have
6 difficulty communicating in English. A review of the e-mails written by Plaintiff
7 evidences this fact (R. 668, 669, 674, 671, 677). This does not mean, however,
8 that Plaintiff could not meet the requirements of the position of prosthetics clerk or
9 prosthetics purchasing agent with reasonable accommodation. On the contrary,
10 Plaintiff presented credible evidence to show that she has the necessary skills to
11 perform these positions, with reasonable accommodations.

12 The Court finds credible the testimony of Jennifer White and Dr. Marlowe,
13 both of whom concluded that with appropriate accommodations, Plaintiff could
14 have performed the essential functions of her job in the prosthetics department (R.
15 1748, 1772). Defendants did not provide any evidence to refute these
16 conclusions. Instead, Defendants rely on the testimony of Mr. Lounsbury, who
17 concluded that Plaintiff did not have the necessary skills to perform the position,
18 without considering or exploring any reasonable accommodations.

19 Further, Mr. Lounsbury gave Plaintiff a favorable performance appraisal for
20 the period between April 1, 2000, and March 31, 2001 (R. 511-12). Also, there is
21 nothing in the record to indicate that a higher level of reading was required for the
22 position than what Plaintiff could have obtained if properly accommodated.

23 The Court rejects Defendants' argument that because Plaintiff filed an
24 application for disability retirement, she is precluded from arguing that she is a
25 qualified individual with a disability who can perform the essential functions of her
26 position. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 797-98 (1999)
27 (finding that an ADA claim of ability to work with accommodation was not
28 inconsistent with receipt of SS Disability Insurance based on "inability to do

1 substantial gainful work in the national economy”)’ *Norris v. Sysco Corp.*, 191
2 F.3d 1043, 1048-49 (9th Cir. 1999) (ruling that judgment as a matter of law was
3 improper where plaintiff bringing ADA claim had applied for and accepted
4 disability benefits).

5 Also, Plaintiff was encouraged by the VA to seek the disability benefits.
6 Plaintiff testified that she did not want to apply for disability retirement and she
7 would rather work, but she concluded that she did not have any choice, since
8 Defendants continued to fail to reasonably accommodate her. That decision should
9 not be now held against her. *See Szedlock v. Tenet*, 139 F. Supp. 2d 725, 733 (E.D.
10 Va. 2001) (affirming award of lost wages on Rehabilitation Act claim where the
11 plaintiff applied for and accepted disability retirement as “the direct result of
12 defendant’s failure to accommodate her disability.”).

13 The Court concludes that Plaintiff has established that she is a qualified
14 individual with a disability.⁷

15 **ii. Whether Plaintiff’s Claims are Time-Barred**

16 Plaintiff is asserting three claims for failure to accommodate: (1) the failure
17 to provide interpreters and communication assistance at her request; (2) the failure
18 to find another position for her or remove her from Mr. Lounsbury’s supervision;
19 and (3) the failure to engage in the mandatory interactive process while she was
20 employed at the VA.

21 _____
22 ⁷Additionally, in the Final Agency Decision, the VA’s Office of
23 Employment Discrimination Complaint Adjudication found that management had
24 testified that Plaintiff was qualified to perform the essential functions of her
25 position as Prosthetics Clerk (Ct. Rec. 34, Ex. B). It found that Plaintiff was a
26 qualified individual with a disability who was subjected to an adverse employment
27 action when she was terminated from the agency effective July 11, 2003, and
28 concluded that Plaintiff had established a prima facie case of disability
discrimination. *Id.*

1 Defendants argue that Plaintiff's claims for failure to accommodate her by
2 providing interpreters and communication assistance fail because they are time-
3 barred. Plaintiff's last day working on the job was November 19, 2001, after
4 which she did not have any contact with Defendants until April, 2003.⁸
5 Under the federal regulations, aggrieved persons who believe they have been
6 discriminated against on the basis of a handicap must consult with an EEOC
7 counselor prior to filing a complaint in order to try to informally resolve the matter.
8 29 C.F.R. § 1614.105(a). This consultation must occur within 45 days of the date
9 of the matter alleged to be discriminatory, or in the case of personnel action, within
10 45 days of the effective date of the action. *Id.* Failure to comply with the
11 regulations is "fatal to a federal employee's discrimination claim." *Cherosky v.*
12 *Henderson*, 330 F.3d 1243, 1246 (9th Cir. 2003). The Supreme Court has held that
13 each denial for a request for accommodation is a discrete act, accruing on the date
14 of denial of the requested accommodation. *National Railroad Passenger Corp. v.*
15 *Morgan*, 536 U.S. 101, 122 (2002). It is undisputed that Plaintiff did not consult
16 with an EEO counselor after her last day on the job, which would be the latest date
17 that any specific request for an interpreter or communication assistance could have
18 been denied.

19 Plaintiff argues that the continuing violation doctrine allows her claims for
20 denial of specific requests for accommodation to survive. The Supreme Court in
21 *Morgan*, however, limited the continuing violation doctrine to claims based on
22 hostile work environment. It explicitly stated that "[e]ach discrete discriminatory
23 act starts a new clock for filing charges alleging that act." *Id.*

24 Moreover, in *Cherosky*, the Ninth Circuit addressed this same issue. In that
25 case, the plaintiffs contacted the EEO in August, 1997, after the U.S. Postal

26 ⁸Defendants concede that Plaintiff's claim for failure to accommodate for
27 failing to assign her to a new position, or to remove her from Mr. Lounsbury's
28 supervision is timely.

1 Service denied their requests for respirators made in October 1994. *Cherosky*, 330
2 F.3d. at 1245. The Circuit held that because the plaintiffs did not initiate contact
3 with an EEO officer within 45 days of the denial of their requests to wear
4 respirators, the claims were time-barred. *Id.* at 1248. The Circuit specifically
5 rejected the argument that denial of a proposed accommodation can be a
6 continuing violation.⁹ *Id.*

7 Plaintiff has not argued that her claim regarding the failure to provide
8 specific accommodations should be equitably tolled. Accordingly, the Court
9 concludes that Plaintiff cannot challenge the denial of specific requests for
10 accommodation and communication assistance that occurred prior to the
11 limitations period, which at the latest would begin to run on November 20, 2001,
12 because she did not initiate contact with a counselor within 45 days of the denial.

13 **iii. Failure to Engage in the Interactive Process**

14 Plaintiff argues that the Rehabilitation Act requires that employers engage in
15 a mandatory interactive process, that Defendants failed to engage in the interactive
16 process, and liability is appropriate because a reasonable accommodation without
17 undue hardship to the employer was possible. The Court agrees.

18 In *Humphreys v. Memorial Hospitals Ass'n*, the Ninth Circuit held that once
19 an employer becomes aware of the need for accommodation, that employer has a
20 mandatory obligation under the ADA to engage in the interactive process with the
21 employee to identify and implement appropriate reasonable accommodations. 239
22 F.3d 1128, 1137 (9th Cir. 2001). “The interactive process requires communication
23 and good-faith exploration of possible accommodations between employers and

24
25 ⁹The Circuit noted, however, that because the plaintiffs were still employees
26 of the U.S. Postal Service, the time-bar could be cured by making a request for an
27 accommodation, and if the request was denied, then filing a complaint with the
28 EEOC within the 45 days. *Id.* at 1248. Obviously, this is not an option in
Plaintiff’s case.

1 individual employees, and neither side can delay or obstruct the process.” *Id.*
2 “Employers, who fail to engage in the interactive process in good faith, face
3 liability . . . if a reasonable accommodation would have been possible.” *Id.* The
4 duty to accommodate “is a continuing duty that is not exhausted by one effort.” *Id.*
5 (citations omitted).

6 Specifically, the Ninth Circuit noted:

7 Moreover, we have held that the duty to accommodate “is a
8 ‘continuing’ duty that is ‘not exhausted by one effort.’ ” *McAlindin*,
9 192 F.3d at 1237. The EEOC Enforcement Guidance notes that “an
10 employer must consider each request for reasonable accommodation,”
11 and that “[i]f a reasonable accommodation turns out to be ineffective
12 and the employee with a disability remains unable to perform an
13 essential function, the employer must consider whether there would be
14 an alternative reasonable accommodation that would not pose an
15 undue hardship.” EEOC Enforcement Guidance on Reasonable
16 Accommodation, at 7625. Thus, the employer's obligation to engage
17 in the interactive process extends beyond the first attempt at
18 accommodation and continues when the employee asks for a different
19 accommodation or where the employer is aware that the initial
20 accommodation is failing and further accommodation is needed. This
21 rule fosters the framework of cooperative problem-solving
22 contemplated by the ADA, by encouraging employers to seek to find
23 accommodations that really work, and by avoiding the creation of a
24 perverse incentive for employees to request the most drastic and
25 burdensome accommodation possible out of fear that a lesser
26 accommodation might be ineffective.

27 *Id.* at 1138.

28 Thus, in addition to meeting to discuss possible accommodations, the VA
had a duty to explore further arrangements to reasonably accommodate Plaintiff's
disability when it was clear the accommodations that were being provided were not
working. *Id.* Moreover, when the VA denied Plaintiff's request for interpreters
and communication assistance, it had a duty to suggest alternative solutions, or
explore with her the possibility of other accommodations. *Id.*

The Court concludes that the VA utterly failed to meet its obligation to
engage in the interactive communication process. The record demonstrates
Defendants did nothing to educate its staff in regard to the needs of deaf
employees. Mr. Evans testified that it was his opinion that the VA failed to
properly identify, utilize or bother to contact any of the resources that were

1 available to it in designing and implementing a reasonable accommodation plan
2 that might have allowed Plaintiff to be successful in her job in the prosthetics
3 department (R. 1738). Mr. Evans explained that when the Washington Division of
4 Vocational Rehabilitation is contacted by an employer of a person with a disability,
5 a DVR employee would conduct an individualized assessment of the situation,
6 which would include looking at the employee's job requirements along with a
7 determination of the functional abilities and limitations of the employee in question
8 (R. 1737). The evaluation would pinpoint barriers to job performance and identify
9 resources available to design a reasonable accommodation plan that would remove
10 any barriers to employment (R. 1737). Mr. Evans indicated reasonable
11 accommodation plan would include intensive interpretation during the "front end"
12 training; ongoing and regular interpretation; communication assistance with
13 terminology in operational manuals and other written materials; job-related
14 instruction and training; and personalized assistance and supportive management,
15 including extended "on the clock" training to ensure that the written materials
16 Plaintiff was working with were fully and adequately translated from English to
17 ASL¹⁰ (R. 1742).

18 There is nothing in the record to indicate that this type of assessment process
19 was ever completed at the VA. The depositions of Mr. Williams, Mr. Lounsbury,
20 and Ms. Brown indicate that none of these VA managers ever contacted the DVR
21 on behalf of Plaintiff, and Mr. Evans reports that to the best of his knowledge, no
22 management personnel at the VA ever contacted DVR to request any services on
23 behalf of Plaintiff (R. 1736). Mr. Evans indicated that Plaintiff was an enrolled
24 client with the Washington State Division of Vocational Rehabilitation at the time
25 of her employment with the VA, and as such, would have been eligible to receive

26 ¹⁰Mr. Evans reported that these types of accommodations are provided to
27 deaf employees at the Social Security Administration and these employees have
28 excelled in their jobs (R. 1742).

1 numerous services and supports to maintain her employment and that these
2 services and supports could have been provided at no cost to the agency. *Id.*

3 Indeed, Defendants admitted at oral argument that throughout Plaintiff's
4 tenure at the VA, the VA was ignorant with regard to the needs of a deaf employee,
5 and stated that if the VA had done such an assessment, it was very likely it would
6 have provided the necessary accommodations as suggested by the experts.

7 What did happen was clear, however. Plaintiff would request
8 accommodations. Mr. Lounsbury, who had no training, expertise, or
9 understanding of the needs of deaf employees, would decide that an interpreter was
10 not necessary, and would deny the request, or would require that Plaintiff read the
11 manuals first before an interpreter would be provided (R. 512). As Mr. Evans
12 explained, requiring Plaintiff to read the manuals before an interpreter would be
13 provided is analogous to telling a person with a disability who uses a wheelchair
14 that there is a bathroom for physically disabled persons available at the top of a set
15 of stairs (R. 1738). The person in the wheelchair cannot get there so the bathroom
16 is inaccessible. *Id.* Likewise, Plaintiff could not read the manuals or understand
17 them without the availability of an interpreter so they were inaccessible to her
18 despite the promise of an interpreter later. *Id.* Mr. Evans concluded that Mr.
19 Lounsbury's requirement that she read the manuals before he would provide an
20 interpreter doomed her to failure in her job in the prosthetics department (R. 1738).
21 Ms. White equated the requirement that Plaintiff must first read the manuals before
22 receiving interpreter assistance to asking a non-German speaking individual to take
23 a math test in German; rather than measuring the individual's math skills, such a
24 test would measure their German skills (R. 1749).

25 The Court concludes that this duty to engage in the interactive process was
26 ongoing and continued up to the day that Plaintiff was removed from her position
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28

1 at the VA.¹¹ The Court concludes that Plaintiff's extended absence from work was
2 the direct result of stress and anxiety that was caused by Defendants' failure to
3 engage in the interactive process while Plaintiff was employed in the prosthetic
4 department. Thus, rather than demanding that Plaintiff submit medical
5 justification, resign, or return to work in the same position, Defendants should have
6 discussed with Plaintiff the type of accommodations that would be required to
7 allow her to be successful in the position. This is especially true when it became
8 clear that the accommodations that Defendants were providing were not working.
9 *See Humphrey*, 239 F.3d at 1138.

10 Defendants argue that it should not be held liable because Plaintiff failed to
11 adequately participate in the interactive process by failing to provide any additional
12 medical information. Defendants did not support its argument with any citation to
13 case law. While the Court agrees that neither side can obstruct or delay the
14 interactive process, it concludes that Plaintiff's failure to supply additional medical
15 information did not negate Defendants' affirmative duty to engage in an interactive
16 communication with Plaintiff. The requested medical records had nothing to do
17 with Plaintiff's disability, which was deafness, and would not have assisted in
18 developing a reasonable accommodation plan.

19 The Court concludes that the VA failed to make good faith efforts to provide
20 reasonable accommodations for Plaintiff's disability, and failed to engage in an
21 interactive communication with Plaintiff regarding reasonable accommodations
22 that would allow Plaintiff to succeed in her position in the prosthetics department.
23 As such, the VA is liable because reasonable accommodations were possible.

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¹¹Thus, Plaintiff's claim is timely under 29 C.F.R. § 1614.105(a).

1 **iv. Failure to Assign Plaintiff to a New Position**

2 Plaintiff asserts there were at least ten positions available between May and
3 July 2003. Ms. White opined that Plaintiff was qualified to perform the essential
4 functions of several of these open positions (R. 1753). Mr. Bedwell testified that
5 he was aware of at least two available positions around this time and he declared
6 that she could have performed the essential job functions of both these positions
7 (R. 1783).

8 Defendants have not produced any evidence to rebut Plaintiff's evidence that
9 there were positions that were available for which she was qualified with
10 reasonable accommodations. Mr. Williams stated that he reviewed these positions
11 and she was not qualified for any of them (R. 1697). There is nothing in the
12 record, however, to indicate that Mr. Williams reviewed these positions with a
13 qualified expert to see if any reasonable accommodations would be put in place to
14 allow Plaintiff to perform the essential functions of the positions. The Court
15 rejects Defendants' argument that there is no evidence that moving Plaintiff to a
16 different position would resolve her underlying inability to read.

17 **v. Reasonableness of Accommodation**

18 Defendants argue that if the Court concludes that Plaintiff was a qualified
19 individual with a disability who was entitled to reasonable accommodation, the VA
20 met its burden when it provided sign interpreters, TTY machines, visual cue
21 alarms, etc. to facilitate the communication difficulties inherent with a deaf person.
22 According to the VA, what Plaintiff was really seeking was to have the VA teach
23 her how to read, or to read for her. Thus, Plaintiff cannot identify a reasonable
24 accommodation that would have been effective.

25 This reasoning is belied by the testimony of Jennifer White.

26 Ms. White indicated that if she had been contacted by the VA during
27 Plaintiff's tenure there, she would have come into Plaintiff's workplace,
28 interviewed her and Mr. Lounsbury, and examined the manuals she needed to

1 review (R. 1752). She would have recommended a multi-faceted set of
2 accommodations for Plaintiff, including consulting with someone fluent in ASL.
3 *Id.* She would have recommended that a consultant return to train Plaintiff on new
4 materials as needed. (R. 1753). She would have emphasized the visual as a
5 learning tool, since one of Plaintiff's strengths was that she was a visual learner.
6 *Id.* She would have interviewed Plaintiff's supervisor regarding office policies to
7 ensure that this basic information was conveyed to Plaintiff. She would have
8 provided training to Plaintiff's hearing co-workers regarding effective
9 communication with a person who is deaf. *Id.* She would have assessed Plaintiff's
10 skills and advised as to appropriate classes for her to take in order to advance her
11 English skills as needed. *Id.*

12 Ms. White also stated that in virtually every situation with a deaf employee,
13 she recommends staff-wide training regarding deaf culture, ASL and its differing
14 structure from English, and the attendant need for interpreters to enable deaf
15 people to fully demonstrate their abilities and intelligence in the workplace (R.
16 1745).

17 Contrary to the VA's assertions, Plaintiff was seeking and was entitled to
18 more than just learning how to read. The VA's attempts to accommodate Plaintiff
19 fell far short of what is required by the Rehabilitation Act.

20 **vi. Conclusion**

21 The record demonstrates that Plaintiff was a successful employee with a
22 long work history, who for many years worked at the VAMC without any
23 problems. Her problems started when she was transferred to a new position, and
24 VAMC failed to provide any particularized analysis to determine what
25 accommodations would be necessary to allow Plaintiff to perform the job
26 requirements.

27 While the record demonstrates that Plaintiff had difficult communicating in
28 English, Plaintiff has established that her reading difficulties could have been

1 accommodated to allow her to be successful in her position as a prosthetics clerk,
2 or prosthetics purchasing agent. Defendant has failed to provide any contrary
3 testimony, other than the testimony of her supervisor, who reached his own
4 conclusions regarding the time and frequency of the necessary accommodations,
5 even though he was not qualified to do so. Accordingly, Plaintiff has successfully
6 shown that Defendants failed to accommodate her as required by the Federal
7 Rehabilitation Act.

8 (2) Discriminatory Removal¹²

9 A plaintiff alleging disparate treatment must show that (1) she is disabled
10 within the meaning of the statute; (2) she is “otherwise qualified” for the position;
11 (3) she was adversely treated because of her disability; and (4) she worked for a
12 federal agency. *Reynolds v. Brock*, 815 F.2d 571, 573-74 (9th Cir. 1987). Once a
13 *prima facie* case has been made, the burden shifts to the Defendants to demonstrate
14 a legitimate, non-discriminatory reason for the action. *Id.* at 574. The burden then
15 shifts back to Plaintiff to produce evidence showing that the reason offered by the
16 Defendants was pretextual. *Id.*

17 As set forth above, Plaintiff has established a *prima facie* case with regard to
18 her deafness. The burden then shifts to Defendants to show that it had a legitimate,
19 non-discriminatory reason for removing Plaintiff from her employment.
20 Defendants rely on the fact that Plaintiff was AWOL for seven months and failed
21 to provide medical documentation to excuse her absence as a legitimate, non-
22 discriminatory reason for removing Plaintiff.

23 As discussed above, Defendants’ request for additional medical
24 documentation was inappropriate, and instead, the proper course of action was to
25 engage with Plaintiff in an interactive discussion to determine reasonable

26 ¹²Defendants concede that Plaintiff’s claim for discriminatory removal was
27 timely, as she contacted the EEO counselor on July 18, 2003, within 45 days of
28 removal.

1 accommodations. Thus, Defendants are now precluded from relying on the failure
2 to provide the additional documentation as a legitimate, non-discriminatory reason
3 for removing Plaintiff.

4 The Court concludes that Defendants discriminated against Plaintiff by
5 removing her based on her absence, which was directly caused by their failure to
6 engage in an interactive communication process to develop a reasonable
7 accommodation plan to allow Plaintiff to succeed in her position in the prosthetics
8 department. *See Humphrey*, 239 F.3d at 1139 (recognizing that the link between
9 the disability and termination is particularly strong where it is the employer's
10 failure to reasonably accommodate a known disability that leads to discharge for
11 performance inadequacies resulting from the disability).

12 (3) Hostile Work Environment

13 Plaintiff acknowledges that the Ninth Circuit has not explicitly ruled on the
14 availability of a hostile work environment claim based on disability. *See Brown v.*
15 *City of Tuscon*, 336 F.3d 1181, 1190 (9th Cir. 2003). The Fourth, Fifth, and Eighth
16 Circuits have recognized hostile working environment claims under the ADA. *See*
17 *Fox v. General Motors Corp.*, 247 F.3d 169, 175 (4th Cir.2001); *Flowers v.*
18 *Southern Reg'l Physician Servs., Inc.*, 247 F.3d 229, 233 (5th Cir. 2001); *Shaver v.*
19 *Independent Stave Co.*, 350 F.3d 716, 719-20 (8th Cir. 2003). These courts have
20 held that in order to succeed on a claim of disability-based harassment under the
21 ADA, Plaintiff must prove that: (1) she belongs to a protected group; (2) she was
22 subjected to unwelcomed harassment; (3) the harassment complained of was based
23 on her disability or disabilities; (4) the harassment was sufficiently severe or
24 pervasive to alter the conditions of her employment and to create an abusive
25 working environment; and (5) the employer knew or should have known of
26 harassment and failed to take prompt, remedial action. *Flowers*, 347 F.3d at 235-
27 36.

28 Plaintiff argues that the harassment consisted of Mr. Lounsbury's failure to

1 engage in an interactive accommodation dialogue with Plaintiff, his repeated
2 denials of her requests for accommodation and training, his yelling and gestures,
3 and his dismissive and patronizing e-mails to Plaintiff.

4 In the absence of Ninth Circuit precedent, the Court accepts the rulings of
5 the Fourth, Fifth, and Eighth Circuits that have recognized hostile working
6 environment claims under the ADA. In reviewing Plaintiff's claims, the Court
7 looks to Title VII case law to determine whether harassment occurred. *See*
8 *Hernandez v. Hughes Missile Sys. Co.*, 362 F.3d 564, 568 (9th Cir. 2004)(drawing
9 on Title VII precedent to set out plaintiff's burden in an ADA case); *Snead v.*
10 *Metro Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1093 (9th Cir. 2001) (holding that
11 Title VII analysis applies in ADA cases). In doing so, the Court must look at "all
12 the circumstances," including "the frequency of the discriminatory conduct; its
13 severity; whether it is physically threatening or humiliating, or a mere offensive
14 utterance; and whether it unreasonably interferes with an employee's work
15 performance" to determine whether an actionable hostile work environment claim
16 exists. *Nat'l R. R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002). The
17 Supreme Court has held that "[w]hen the workplace is permeated with
18 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or
19 pervasive to alter the conditions of the victim's employment and create an abusive
20 working environment,' Title VII is violated." *Harris v. Forklift Sys. Inc.*, 510 U.S.
21 17, 21 (1993).

22 The Court concludes that Plaintiff has not establish a hostile work
23 environment claim based on her disability. The yelling and gestures, and
24 dismissive and patronizing e-mails do not rise to the level of "harassment", nor do
25 they create a hostile workplace environment. *See Oncale v. Sundowner Offshore*
26 *Servs., Inc.*, 523 U.S. 75, 80 (1998) (recognizing that Title VII is not a general
27 civility code for the workplace and does not prohibit all employment-related verbal
28 or physical harassment); *see also Brooks v. City of San Mateo*, 229 F.3d 917, 927

1 (9th Cir.2000) (“[N]ot all workplace conduct that may be described as harassment
2 affects a terms, condition, or privilege of employment within the meaning of Title
3 VII.”).

4 Also, it is undisputed that the alleged conduct occurred prior and up to
5 November 20, 2001. There is nothing in the record to indicate that Plaintiff had
6 any contact with Mr. Mr. Lounsbury after this date. A hostile work environment
7 claim is composed of a series of separate acts that collectively constitute one
8 “unlawful employment practice.” 42 U.S.C. § 2000e-5(e)(1). The timely filing
9 provision only requires that a Title VII plaintiff file a charge within a certain
10 number of days after the unlawful practice happened. *Morgan*, 536 U.S. at 118. It
11 does not matter, for purposes of the statute, that some of the component acts of the
12 hostile work environment fall outside the statutory time period. *Id.* Provided that
13 an act contributing to the claim occurs within the filing period, the entire time
14 period of the hostile work environment may be considered by a court for the
15 purposes of determining liability. *Id.*

16 Here, the alleged acts contributing to the hostile work environment
17 claim—Mr. Lounsbury’s failure to engage in an interactive accommodation
18 dialogue with Plaintiff, his repeated denials of her requests for accommodation and
19 training, his yelling and gestures, and his dismissive and patronizing e-mails to
20 Plaintiff—fell outside the statutory time period. Accordingly, Plaintiff’s hostile
21 work environment claim fails.

22 **C. Review of the MSPB’s Decision**

23 The Court will uphold the MSPB’s decision unless it is arbitrary, capricious,
24 an abuse of discretion, or otherwise not in accordance with law; obtained without
25 procedures required by law, rule, or regulation having been followed; or
26 unsupported by substantial evidence. *Garrett*, 10 F.3d at 1428.

27 The VA removed Plaintiff on July 11, 2003, on the grounds that Plaintiff
28 was “absent without approved leave (AWOL) for the period of October 21, 2002,

1 through May 9, 2003.” To prove a charge of AWOL, the agency must show by
2 preponderance of the evidence that the employee was absent and her absence was
3 not authorized or that her request for leave was properly denied. *Rojas v. United*
4 *States Postal Servs.*, 74 M.S.P.R. 544, 548 (1997). Preponderance of the evidence
5 is that degree of relevant evidence which a reasonable person, considering the
6 record as a whole, would accept as sufficient to find that a contested fact is more
7 likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2).

8 The MSPB reviews the agency’s decision denying LWOL (leave without
9 pay) under an abuse of discretion standard. *Wells v. Dep’t of Health and Human*
10 *Servs.*, 29 M.S.P.R. 346, 348 (1985). If the agency’s charge of AWOL is
11 sustained, the MSPB will review an agency-imposed penalty only to determine
12 whether the agency considered all of the relevant factors and exercised
13 management discretion within tolerable limits of reasonableness. *Douglas v.*
14 *Veterans Admin.*, 5 M.S.P.R. 280, 306 (1981).

15 In issuing the Final Agency Decision, the VA official considered the
16 following in making his decision: Plaintiff’s lengthy absence, which was ongoing,
17 the fact that she was unable to say with certainty when she was able to return to
18 work, in any capacity, and the fact that she promised to provide medical evidence
19 covering the AWOL period, yet failed to do so. He also considered Plaintiff’s
20 length of service, her past work record, and other extenuating circumstances, such
21 as her deafness and attending “frustrations and challenges.” He sustained the
22 charge of AWOL and concluded that the charge was of such gravity that mitigation
23 of the proposed penalty of removal was not warranted.

24 The MSPB upheld the VA official’s decision, finding that the officer
25 considered the relevant factors and exercised his discretion within tolerable limits
26 of reasonableness. The AJ analyzed the removal as a denial of leave without pay
27 by inferring that Plaintiff made a leave request at the May 29, 2003, meeting when
28 she stated that she thought her doctor had supplied medical information to support

1 her absence, even though Plaintiff did not make a formal leave request.¹³ He
2 sustained the removal because Plaintiff failed to document her medical condition
3 from October 21, 2002, through May 9, 2003, and found that the agency's choice
4 of penalty was not so excessive to be an abuse of discretion, nor did it exceed the
5 maximum reasonable penalty, and affirmed the agency's decision.

6 With respect to Plaintiff's affirmative defense of disability discrimination,
7 the AJ found that the accommodation that Plaintiff was seeking was assignment to
8 another position; or not being under the supervision of Mr. Lounsbury; or extended
9 leave to cover her absence. The AJ characterized Plaintiff's claim as not being
10 based on the fact that she was deaf, but based on the fact of her medical inability to
11 work under Mr. Lounsbury, and that absent this stressor, she could have performed
12 the duties as a prosthetics clerk.

13 The AJ relied on the fact that Plaintiff applied for disability retirement as
14 evidence that she did not believe that she could work for the agency in any
15 capacity, with or without accommodation. Then, after her disability was denied,
16 Plaintiff failed to give the VA any indication that she intended to return to work, or
17 that she was medically able to do so. The AJ determined that at this point the
18 agency had no obligation to consider accommodating her any further.

19 The MSPB's affirmation of the VA's removal of Plaintiff was arbitrary and
20 capricious. First, the MSPB erred in concluding that the accommodations that
21 Plaintiff was requesting was assignment to another position; not being under the
22 supervision of Mr. Lounsbury, or extended leave to cover her absence. In doing
23 so, the MSPB failed to address Plaintiff's claim that the VA failed to engage in an
24 interactive process with the employee regarding accommodation. The request to

25 ¹³The AJ assumed that Plaintiff was incapacitated for duty during the entire
26 period, so he found it unnecessary to decide whether Plaintiff would reasonably
27 have felt compelled to remain off work due to harassment, even if she were not
28 incapacitated.

1 not be under the supervision of Mr. Lounsbury was only in response to his failure
 2 to engage in an interactive process with her regarding reasonable accommodations
 3 that would allow Plaintiff to be successful in her job. In doing so, the MSPB failed
 4 to consider whether the requested medical documentation was necessary in light of
 5 the failure of the Defendants to engage in the interactive process with Plaintiff in
 6 regard to her deafness.

7 Also, the MSPB incorrectly concluded that the union contract did not
 8 authorize Plaintiff's extended leave. In doing so, it failed to consider the affect on
 9 the union contract, and whether it was necessary for Plaintiff to provide additional
 10 medical documentation when the documentation she did provide to Defendants
 11 was clear regarding to her work-place injury claim.

12 The Union Contract clearly states that employees with work-related injuries
 13 or illness are barred from performing duties beyond the limits prescribed by their
 14 treating physicians.¹⁴ The MSPB concluded that before subsection (B) applies, the

15 _____
 16 ¹⁴Article 29, Section 9, of the applicable collective bargaining agreement
 17 (CBA) provides:

18 Section 9 - Work-Related Injuries and Illness

19 A. Employees must report any and all injuries that are work-related to their
 20 supervisor. The supervisor will take appropriate action to insure that:

21 1. The employee has the opportunity to report to the Employee Health
 22 Physician or their personal physician for treatment, completion of necessary
 23 reports, etc.;

24 2. Appropriate facility personnel are promptly notified to ensure timely
 25 processing of necessary reports and employee claims. The Department agrees that
 26 assistance will be given to employees in preparing necessary forms and documents
 27 for submission to the Office of Workers' Compensation Programs (OWCP) and
 28 that employees will be informed of their rights under the Federal Employees'
 Compensation Act, as amended in 1974.

B. An employee who has sustained a work-related injury or illness will be
 required to perform duties only to the extent and limits as prescribed by the treating
 physician or the Employee Health Physician, as appropriate. No employee will be
 assigned duties when, in the physician's opinion, this would aggravate the
 employee's injury or illness. In the event that the employee's supervisor does not
 have limited duty that meets the physician's stated limitations for the employee,
 the supervisor will make a good faith effort to locate limited duty work within the
 facility that the employee can perform. If limited duty is not available, the
 employee will be placed on continuation of pay, if eligible, or in an appropriate
 leave status at the employee's option. The union may suggest limited duty

1 employee must first file and be granted compensation benefits from the Office of
2 Workers' Compensation Programs. This conclusion is not supported by the plain
3 language of the contract. The plain language of the contract states that section (B)
4 applies to "an employee who has sustained a work-related injury or illness."
5 Section (B) does not state that it applies to an employee who has been granted
6 compensation benefits from the Office of Workers' Compensation Programs.
7 Moreover, John Bedwell the union representative, testified that there is no
8 requirement in the contract that the employee must submit a claim to the Office of
9 Workers Compensation in order to trigger this contract provision (R. 1776). Mr.
10 Bedwell points out that some claims for work-related illnesses or injury might not
11 rise to the level of a compensable workers compensation claim, but would still be
12 covered under the contract. *Id.* Mr. Bedwell states that as soon as the ill employee
13 provides medical documentation, their work situation must be changed, whether or
14 not the employee files a workers compensation claim. *Id.*

15 Also, the MSPB failed to consider the fact that Plaintiff reported a work-
16 related injury to her supervisor when John Bedwell delivered the doctor's notes to
17 Mr. Lounsbury. It is undisputed that Mr. Lounsbury received notice that Plaintiff
18 was claiming a work-related injury (R. 1777, 1980). Mr. Bedwell provided Mr.
19 Lounsbury with a copy of the treatment plan of Dr. Harold Bailey, M.D., a
20 physician in the VAMC employee health department, regarding her medical
21 condition at the time she left her job on November 19, 2001. *Id.* Mr. Lounsbury
22 also received a separate doctor's note regarding Plaintiff's condition, which he
23 forwarded on to the VAMC Human Resources department. Also, Mr. Bedwell sent
24 an e-mail to Thomas Williams, notifying him that Plaintiff was being placed on
25 medical leave from her current work environment, due to stressors. (R. 711).

26 The MSPB failed to consider the fact that Mr. Lounsbury failed to meet his
27

28 opportunities at the facility. The union has the right to represent any unit employee
at any state of this procedure.

1 obligation under the union contract to insure that appropriate facility personnel are
2 promptly notified to ensure timely processing of necessary reports and employee
3 claims. The MSPB failed to consider the fact that VAMC failed to provide
4 assistance to Plaintiff in preparing necessary forms and documents for submission
5 to the Officer of Workers' Compensation Programs in November, 2001.

6 Under the union contract Plaintiff was not required to work as long as there
7 were identified stressors at the workplace, and Defendants failed to meet its
8 obligations to help her process her worker's compensation claims, Therefore, the
9 VA's decision that she was AWOL is not supported by substantial evidence,
10 because Plaintiff had a legitimate defense to the AWOL claim.

11 Also, the MSPB inferred that Plaintiff made a formal leave request at the
12 May 29, 2003, meeting when she stated that she thought her doctor had supplied
13 medical information to support her absence. This inference is not supported by the
14 record. Plaintiff's statement was made in response to specific demands by
15 Defendants, and was no indication that she was seeking extended leave based on
16 her medical condition. The MSPB failed to consider the statement made by
17 Plaintiff at that particular meeting that, "I have thought about coming back to work
18 . . . maybe I could. Maybe the doctor would let me. Maybe there is some work I
19 could do and not get stressed out," as a request for accommodation. Instead, the
20 MSPB concluded that Plaintiff failed to give the agency any clear indication that
21 she intended to return to work and, consequently, failed to bear her ultimate burden
22 of proving that the agency had an obligation to consider accommodating her
23 further at that point. This conclusion misconstrues the employer's duty that is set
24 forth in *Humphreys*, as discussed above.

25 If the MSPB would have considered these factors, it would have concluded
26 that Plaintiff's absence was directly related to the failure of Defendants to engage
27 in the interactive process to determine suitable accommodations to allow Plaintiff
28 to be successful in her job. As such, the VAMC's decision to deny LWOP status

1 and to terminate Plaintiff because she was absent without approved leave was an
2 abuse of discretion.

3 Consequently, the Court finds the MSPB decision to uphold the agency's
4 termination of Plaintiff's employment to be arbitrary and capricious and not
5 supported by substantial evidence.

6 **D. Remedies**

7 In her trial brief, Plaintiff asks that this Court to overturn the MSPB's ruling
8 and find in her favor on her discrimination and abuse of discretion claims. In her
9 complaint, Plaintiff requests that the Court overturn and vacate the final decision of
10 the MSPB; declare that Defendants improperly discriminated against her on the
11 basis of her disability; reinstate Plaintiff to her position at VAMC with back wages
12 from November 19, 2001; award Plaintiff compensatory and punitive damages;
13 reverse and remand the MSPB Orders; and award Plaintiff her costs and reasonable
14 attorneys' fees.

15 No evidence was presented at trial regarding the issue of damages. No
16 evidence regarding back wages was presented at trial. Nothing in the briefing
17 suggests the legal authority of the Court to order the requested remedies.
18 Accordingly, the Court is unable to fashion any remedies without further briefing
19 from the parties. Within 30 days from the date of this Order, the parties are
20 directed to file briefing regarding the appropriate remedies that should be ordered
21 consistent with these proceedings and this Order.

22 Accordingly, **IT IS HEREBY ORDERED:**

23 1. Within 10 days from the date of this Order, Plaintiff is directed to file
24 briefing regarding the appropriate remedies that should be ordered consistent with
25 these proceedings and this Order. Defendants shall file their response within 10
26 days from the date of filing of Plaintiff's briefing.

27 2. A telephonic hearing on the issue of remedies is set for **February 22,**
28 **2007, at 9:30 a.m.,** in Spokane, Washington. The parties should call the Court's

1 conference line at (509) 458-6380 to participate in the hearing. However, if the
2 parties wish to appear in person, they should contact Michelle Fox, Courtroom
3 Deputy, no later than **February 21, 2007**.

4 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
5 enter this Order and to furnish copies to counsel.

6 **DATED** this 12th day of January, 2007.

7 *s/ Robert H. Whaley*

8 **ROBERT H. WHALEY**
9 Chief United States District Judge

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